STATE OF MICHIGAN

COURT OF APPEALS

In re M. M. THORNTON, Minor.

UNPUBLISHED
May 17, 2018

No. 340061
Oakland Circuit Court
Family Division
LC No. 2016-841489-NA

Before: O'CONNELL, P.J., and HOEKSTRA and K. F. KELLY, JJ.

PER CURIAM.

Respondent-father appeals as of right from the trial court's order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(g) (failure to provide proper care and custody for the child), (j) (reasonable likelihood that the child will be harmed if returned to the parent's home), and (k)(*ii*) (parent abused the child or a sibling of the child and the abuse included criminal sexual conduct involving penetration). Because the trial court did not clearly err by terminating respondent's parental rights, we affirm.

Petitioner filed a petition seeking termination of respondent's parental rights to his minor child at the initial dispositional hearing. MCR 3.977(E)(1). The petition alleged that respondent committed multiple sexual acts, including oral and vaginal penetration, with the child's half-sister, beginning when she was six years old. The petition further alleged that respondent was unemployed, lacked independent housing, was regularly (and illegally) using marijuana, was not compliant with mental health treatment and had recently attempted suicide. The child's mother, respondent's former girlfriend, was not named in the petition, and the child remained in his mother's sole custody. After respondent was convicted of four counts of first-degree criminal sexual conduct (CSC) relating to his sexual abuse of the child's half-sister, for which he was sentenced to a term of 30 to 60 years' imprisonment, petitioner amended the petition to reflect his convictions. Respondent entered a plea of no-contest to the amended petition, establishing that there was a statutory basis for the trial court to assume jurisdiction over the child under MCL 712A.2(b) and that statutory grounds existed to terminate respondent's parental rights under MCL 712A.19b(3)(g), (j), and (k)(*ii*). MCR 3.977(E)(2) and (3). Respondent's convictions, of which the trial court took judicial notice, and testimony by the investigating Children's Protective Services worker established the factual basis for his plea. At respondent's request, the trial court agreed to hold a hearing on the child's best interests at a later date.

Six months later, the trial court held a hearing on the child's best interests, during which neither respondent nor petitioner presented any witnesses. The trial court, however, took judicial

notice of the social and legal file, without objection, and specifically considered a report filed by the child's Lawyer-Guardian ad Litem (GAL) opining that termination was in the child's best interests. Respondent, who did not testify at the best-interest hearing, requested the trial court to adjourn the hearing so that a psychological evaluation of himself and the child could be performed to aid the trial court's best-interest determination. The trial court did not adjourn the hearing and, relying in part on the report by the child's GAL, concluded that a preponderance of the evidence established that termination was in the child's best interests. Thereafter, the court entered an order terminating respondent's parental rights. Respondent now appeals as of right.

I. BEST-INTERESTS DETERMINATION

Respondent first argues that the trial court clearly erred in finding that termination of his parental rights is in the child's best interests. According to respondent, he shares a bond with his child, and it would be in the child's best interests to remain in his mother's custody while continuing a relationship with respondent through letters, telephone calls, and visits to respondent in prison. Further, respondent maintains that he poses no risk of harm to the child and that a risk of harm cannot be inferred from his sexual abuse of the child's half-sister, who is unrelated to respondent. Additionally, respondent complains about the lack of a psychological evaluation, and he asserts that petitioner failed to present any evidence to show that termination of respondent's parental rights was in the child's best interests. We disagree.

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). See also MCR 3.977(E)(4). "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). We review for clear error a trial court's determination that termination is in a child's best interests. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "A trial court's decision is clearly erroneous [i]f, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made." *Id*. at 41 (quotation marks and citation omitted; alteration in original).

"The trial court should weigh all the evidence available to determine the child[]'s best interests." *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). "To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include the child's bond to the parent, the parent's parenting ability, [and] the child's need for permanency, stability, and finality[.]" *Id*. (quotation marks and citation omitted). Further, the trial court may consider the parent's history of child abuse, *In re Powers Minors*, 244 Mich App 111, 120; 624 NW2d 472 (2000), the safety and wellbeing of the child, *In re VanDalen*, 293 Mich App 120, 142; 809 NW2d 412 (2011), and the likelihood that the child could be returned to the parent's home "within the foreseeable future, if at all," *In re Frey*, 297 Mich App 242, 248-249; 824 NW2d 569 (2012). The trial court may also consider psychological evaluations, the age of the child, and a parent's history. *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009).

In this case, we find no clear error in the trial court's determination that a preponderance of the evidence established that termination of respondent's parental rights is in the child's best interests. As emphasized by the trial court, respondent was convicted of multiple counts of first-degree CSC stemming from his sexual abuse of the child's half-sister, which occurred while the child and his half-sister resided in respondent's home. Respondent was sentenced to a minimum term of 30 years' imprisonment for his CSC convictions and would not be eligible for release from prison for the duration of the child's childhood and well into his adulthood, and thus respondent could not provide a stable or safe home for the child in the foreseeable future, if ever. The evidence also established that, even before his imprisonment, respondent failed to provide proper care and custody for the child in that he lacked housing and income to support him, failed to properly manage his mental illness, used marijuana regularly, and, since 2014, after he and the child's mother separated, did not maintain a close relationship with the child, visiting him only on a sporadic and inconsistent basis. Indeed, the evidence showed that the child, who was seven years old at the time of the best interests hearing, rarely spoke about respondent; and, when asked to draw pictures of his family, he did not include respondent as part of his family unit. In contrast, the child had a loving, nurturing, and stable home with his mother[1] and half-siblings, and he had expressed a desire to be adopted by his mother's new boyfriend. From this evidence, the trial court concluded that there was no evidence of a bond between respondent and the child, that the child faced a risk of harm in respondent's care, that respondent could not meet the child's need for stability and permanency, and that respondent could not provide the child with a safe and secure home. Thus, the trial court concluded that termination of respondent's rights was in the child's best interests.

In contrast, respondent insists that he does share a bond with the child; but, as discussed, this assertion is not supported by the evidence. Respondent also disputes the trial court's conclusion that the child faced a risk of abuse, and respondent emphasizes that he abused the child's half-sister, who is unrelated to respondent. Contrary to this argument, respondent's treatment of one child is "certainly probative" of how respondent will treat other children, *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001), and this doctrine of anticipatory abuse based on previous abuse of another child is not limited to past abuse of a parent's own child, *In re Powers*, 208 Mich App 582, 592-593; 528 NW2d 799 (1995), superseded on other grounds by MCL 712A.19b(3)(b)(*i*). Given respondent's grievous abuse of the child's half-sister, the trial court did not clearly err by concluding that the child faced a risk of harm in respondent's care. Additionally, respondent also asserts that, while safely in his mother's care, the child would not be harmed by maintaining a relationship with respondent via letters, telephone calls, and prison visits. But, such an argument is disingenuous given that, as emphasized by the trial court, even when respondent was not in prison and he had the ability to pursue a relationship with the child, respondent failed to provide for the child and had only sporadic contact with him. Although

[1] Under MCL 712A.19a(8)(a), a child's placement with a relative weighs against termination. *Olive/Metts*, 297 Mich App at 43. However, as the trial court noted, the child's mother is not a "relative" as defined under MCL 712A.13a(1)(j), and thus the fact that the child lives with his mother does not weigh against termination. See *In re Schadler*, 315 Mich App 406, 412-413; 890 NW2d 676 (2016).

respondent now desires to maintain a relationship with his child while in prison, the focus of the best-interest determination is on the child, not the parent, *Moss*, 301 Mich App at 87, and the evidence supports the conclusion that the child's need for permanency, stability, safety, and finality will not be furthered by any kind of ongoing contact with respondent. Rather, given the lack of any significant bond between respondent and the child, the child's stable home with his mother, and the serious nature of respondent's sexual abuse of the child's half-sister, for which he would remain in prison for the duration of the child's youth, the trial court did not clearly err by determining that termination is in the child's best interests. *Olive/Metts*, 297 Mich App at 40.

Related to his best interests arguments, respondent also complains that the trial court's findings were deficient because there was no witness testimony presented at the best-interest hearing, nor was a psychological evaluation of respondent or the child performed. These arguments are without merit. MCL 712A.19b(5) does not require the trial court to consider any specific type of evidence when making a best interests determination. Instead, the determination whether termination is in the child's best interests is based on consideration of all the evidence within the entire record. *White*, 303 Mich App at 713. The record in this case included the evidence presented during the earlier plea proceedings, which included respondent's plea, the trial court's judicial notice of his convictions, and testimony from the CPS investigator. See *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011) ("[C]hild protective proceedings are viewed as one continuous proceeding."). Further, the trial court is not limited to legally admissible evidence when deciding whether termination is in the best interests of the child, MCR 3.977(E)(4),[2] and thus, even assuming the GAL's report was not admissible under the rules of evidence, the trial court could properly rely on the GAL's report. Additionally, while the trial court had discretion to order a psychological evaluation if the court believed that the evidence was not "fully developed," a psychological evaluation is not mandatory. MCR 3.923(B). See also *In re Bell,* 138 Mich App 184, 187-188; 360 NW2d 868 (1984). Given the record in this case, we are not persuaded by respondent's contention that the trial court was unable to properly consider the child's best interests in the absence of psychological evaluations.[3] To the contrary,

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[2] When termination of parental rights is sought at the initial dispositional hearing, legally admissible evidence is required to establish statutory grounds for terminating parental rights, MCR 3.977(E)(3); but, the court rules contain no similar requirement for a best interests determination under MCR 3.977(E)(4).

[3] In a conclusory manner, respondent asserts on appeal that the trial court's denial of his request to adjourn the best-interest hearing for a psychological evaluation violated his right to due process. This cursory argument, made without citation to supporting legal authority, is insufficiently briefed, and we consider it to be abandoned. *In re ASF*, 311 Mich App 420, 440; 876 NW2d 253 (2015). In any event, given the six month delay between respondent's plea and the best interests hearing, we can see no "legally sufficient" or "substantial" reason why the trial court should have adjourned the proceedings, particularly when the evidence overwhelmingly established that termination was in the child's best interests and there was nothing but speculation to suggest that respondent's position would be aided by a psychological evaluation. See MCR 3.923(G); *In re Utrera*, 281 Mich App 1, 11; 761 NW2d 253 (2008). Thus, the trial court did not abuse its discretion by denying respondent's request for an adjournment. *Utrera*,

there was ample evidence which overwhelmingly demonstrated that termination of respondent's parental rights was in the child's best interests. Consequently, the trial court's best interest determination was not clearly erroneous, and the trial court did not clearly err by terminating respondent's parental rights.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent next argues that his trial counsel's unpreparedness deprived him of the effective assistance of counsel during the best-interest hearing. Specifically, respondent argues that his counsel provided deficient representation by (1) failing to obtain a psychological evaluation of respondent and the child, and (2) failing to call witnesses, including respondent, at the best interests hearing to testify that the child shared a bond with respondent and respondent's relatives. At the outset, we note that respondent failed to include an ineffective assistance claim in his questions presented, meaning that this argument is improperly presented and need not be considered. See MCR 7.212(C)(5); *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). Regardless, even if we considered respondent's ineffective assistance claim, we would conclude that his arguments are without merit.

"The principles applicable to claims of ineffective assistance of counsel in the arena of criminal law also apply by analogy in child protective proceedings; therefore, it must be shown that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and that (2) the deficient performance prejudiced the respondent." *In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016). Respondent bears the "burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). And, respondent must "overcome the strong presumption that counsel's performance constituted sound trial strategy." *Martin*, 316 Mich App at 87. Because an evidentiary hearing has not been held, our review is "limited to mistakes apparent on the record." *People v Fonville*, 291 Mich App 363, 383; 804 NW2d 878 (2011).

On the record before us, respondent has not established that he was denied the effective assistance of counsel. With regard to counsel's failure to obtain psychological evaluations of respondent and the child, there is no evidence that such evaluations would have been favorable to respondent, and thus respondent cannot show that he was prejudiced by counsel's failure to obtain psychological evaluations. Cf. *Martin*, 316 Mich App at 88. In terms of counsel's failure to call witnesses, the decision whether to call witnesses is presumed to be a matter of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and respondent has not overcome this presumption. That is, he asserts that counsel should have called witnesses, including respondent, to testify about respondent's bond with the child and the child's bond with his paternal relatives. But, respondent offers no evidence of what testimony he or any other potential witnesses would have offered, and there is certainly no evidence that anyone could

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281 Mich App at 8. Further, given that respondent had ample time before the best interests hearing to investigate and prepare for the proceedings, the trial court's failure to adjourn the proceedings to allow respondent additional time to obtain a psychological evaluation did not violate due process. See *In re Morris*, 300 Mich App 95, 108; 832 NW2d 419 (2013).

have offered testimony favorable to respondent. Absent an offer of proof, respondent has not established the factual predicate for his claim and he cannot establish that he was prejudiced by counsel's failure to call witnesses. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). More generally, given the strong evidence supporting termination in this case, respondent cannot establish a reasonable probability that, had testimony regarding his bond with the child or a psychological evaluation been presented at the best-interest hearing, such evidence would have resulted in a different outcome of the termination proceedings. Consequently, respondent's ineffective assistance claims are without merit.

Affirmed.

/s/ Peter D. O'Connell
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly